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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 90

LIPE HENSLEE, INDIVIDUALLY, NOW RESIDING IN DAVIDSON COUNTY, TENNESSEE, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF TENNESSEE, PETITIONER

v.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, A NATIONAL BANK AT MEMPHIS, TENNESSEE, AND WILBURN K. NOELL, A RESIDENT CITIZEN OF MEMPHIS, TENNESSEE, EXECUTORS OF THE ESTATE OF WILLIAM BATE WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 24-25) is reported in 74 F. Supp. 113. The opinion of the Court of Appeals (R. 31-36) is reported in 166 F. 2d 993.

JURISDICTION

The judgment of the Court of Appeals was entered March 15, 1948. (R. 30.) The petition for a writ of certiorari was filed June 11, 1948, and was granted October 11, 1948. (R. 37.) The jurisdiction of this Court rests on 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether a charitable bequest in the remainder of the corpus of a testamentary trust is deductible for estate tax purposes under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations, where the trustees are empowered in their discretion to invade the corpus "for the pleasure, comfort and welfare" of the life beneficiary, the testator's mother, and are directed to provide for her "in such manner as she may desire."

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(d) [As amended by Section 408 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and by Section 511 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers

(including the interests which fall into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944), to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. * * *

(26 U. S. C. 1946 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44. *Transfers for public, charitable, religious, etc., uses.*— * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *.

SEC. 81.46. Conditional bequests.— * * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which

would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from any exercise of such power. (Italics supplied.)

STATEMENT

The appeal below was from the order of the District Court (R. 26) granting the Collector's motion to dismiss the complaint for failure to state a cause of action (R. 23). The material facts as alleged in the complaint and the amendments and exhibits thereto (R. 1-23), and found by the District Court (R. 24-25), may be summarized as follows:

William Bate Williams, the testator, died in 1943 leaving a gross estate of $508,411 and a net estate of $426,899. (R. 1.) His will directed (R. 7-8) that the entire net estate be held in trust for the use and benefit of his mother during her life, that the trustees pay to her $750 monthly out of either the income or corpus, and that—

> In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.
>
> The first object to be accomplished in the administration and management of my estate

> and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

Upon the death of the mother the trustees were to convert the estate "as it then exists" into cash, and pay certain specific bequests. (R. 9-10.) The "balance" was then to be paid in equal shares to four named charities as a "residuary bequest" which was "not to infringe on any of the other legacies hereinbefore provided". (R. 10-11.)

At the time of the testator's death his mother was about eighty-five years of age, and she died three years later. She had property of her own, valued at about $100,000 and yielding an income of $250 to $300 per month, in addition to which she received $16,500 as a creditor of the estate. She owned her own home, and had no dependents or close relatives. Her mode of living was simple and economical, and she never requested from the trustees any amounts over and above the $750 which they paid to her monthly. (R. 3-4, 22-23, 25.)

In the federal estate tax return the executors-trustees sought to deduct from the taxable estate $121,869 as the value of the charitable bequests. The deduction was disallowed. The resultant deficiency was paid, claim for refund was filed and denied, and suit for refund followed. (R. 2-3, 25.) The Collector moved to dismiss the com-

plaint for failure to state a claim upon which relief could be granted (R. 23), and the District Court sustained the motion on the authority of *Merchants Bank* v. *Commissioner*, 320 U. S. 256 (R. 43). The Court of Appeals reversed and remanded the case to the District Court for trial and determination of whether the possibility of invasion of the charitable bequests was "so remote as to be negligible". (R. 36.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding, contrary to the decision of this Court in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, that a charitable bequest in the remainder of the corpus of a testamentary trust which was subject to invasion for the "pleasure, comfort and welfare" of the life beneficiary, and "in such manner as she may desire", was deductible for estate tax purposes under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations, if the prospect of invasion of the charitable bequest was "remote".

(2) In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The decedent in his will authorized his trustees in their discretion to invade the charitable remainder "for the pleasure, comfort and welfare" of his mother, the life beneficiary, and directed

them to provide for her "in such manner as she may desire". Since the extent to which the charitable remainder might be diverted to satisfy the "pleasure" and "desire" of the mother was not susceptible of prediction by any reliable objective standard, the remainder had no ascertainable value as of the testator's death and accordingly was not deductible for estate tax purposes. No tenable distinction can be drawn between this case and *Merchants Bank* v. *Commissioner*, 320 U. S. 256, where this Court held that a discretionary power in the trustee to invade for the "comfort, support, maintenance, and or happiness" of the testator's widow sufficed *per se* to defeat valuation and deduction of the charitable remainder because the existence of such a power injected "elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial". In reversing the District Court's dismissal of the complaint and remanding this case for a determination of whether the possibility of invasion of the charitable remainder was "remote" in the light of the mother's economical living habits and independent means, the court below disregarded this Court's holding in the *Merchants Bank* case. Such extrinsic factors, even if proved, could have no more relevancy here than in that case.

ARGUMENT

Since the bequests to charity had no ascertainable value at the testator's death, they were not deductible from the gross estate under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations

The question here is identical with that decided in *Merchants Bank* v. *Commissioner*, 320 U. S. 256. There the testator bequeathed the corpus of a testamentary trust to charities and empowered the trustee in its discretion to invade the corpus "for the comfort, support, maintenance, and/or happiness" of the life beneficiary, his widow. The Court sustained the long-standing applicable Treasury Regulations, *supra*,[1] which provide that a charitable bequest is deductible only insofar as it has a "presently ascertainable" value as of the testator's death and is exempt from the exercise of a power to divert it to a private use, and held that the extent to which the charitable remainder might be diverted to the widow was not measurable by any reliable objective standard. The mere existence of the invasionary power sufficed to defeat the deduction because (320 U. S. at 263) "Introducing the element of the widow's happiness * * * brought into the calculation elements of speculation too large to be overcome, notwithstanding the

[1] The pertinent provisions of Section 81.44 and 81.46 of Treasury Regulations 105 under the Internal Revenue Code, *supra*, are the same as those of the earlier Regulations approved in the *Merchants Bank* case. Code Section 812 (d), *supra*, is substantially the same as the earlier statutory provision there involved.

widow's previous mode of life was modest and her own resources substantial".

The test applied by this Court in the *Merchants Bank* case was the same as that underlying its decision in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. A difference in result stemmed from a vital difference in the nature of the invasionary power. In the *Ithaca Trust Co.* case the widow was authorized to encroach upon corpus only to the extent "necessary to suitably maintain her in as much comfort as she now enjoys"; since the extent of invasion "was not left to the widow's discretion" but was measurable by a standard "fixed in fact and capable of being stated in definite terms of money" (279 U. S. at 154), the value of the charitable remainder could be determined with sufficient certainty to justify its deduction. In the *Merchants Bank* case, on the other hand, the "extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life" (320 U. S. at 261) and consequently the amount which the charities would eventually receive was not ascertainable with any degree of accuracy. See also *Humes* v. *United States*, 276 U. S. 487; *Robinette* v. *Helvering*, 318 U. S. 184, 188-189; *Smith* v. *Shaughnessy*, 318 U. S. 176.

The charitable remainder in this case was no more susceptible of reliable measurement than the one denied deduction in the *Merchants Bank* case.

In fact, the invasionary power here was even broader than the one there considered. The decedent in his will directed (R. 8) that his net estate be held in trust for the benefit of his mother during her life, that the trustees pay her a fixed amount monthly out of either income or corpus, and that—

> In addition to this amount my said executors and trustees are authorized and *empowered to use and expend in their discretion any portion of my estate,* either income or principal, for the *pleasure,* comfort and welfare of my mother.
>
> *The first object* to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother *in such manner as she may desire* and my executors and trustees are fully authorized and likewise *directed to manage my estate primarily for this purpose.* (Italics ours.)

The "balance" of the estate, after payment of certain specific legacies, was given to charities; and the trustees were admonished that "This is a residuary bequest, however, which is not to infringe" on prior legacies. (R. 10-11.)

No extended argument is needed to demonstrate that under the terms of decedent's will there was no reliable method of forecasting to what extent, if at all, the charitable remainder would take effect.

Granting, *arguendo*, that the amount which might be diverted during the mother's lifetime for her "comfort and welfare" was measurable by a fixed standard, no reliable means existed for ascertaining how much the trustees in their discretion might use for her "pleasure" or how much she herself might "desire".[2] Conceivably, a substantial gift to a friend or relative might afford her "pleasure". Certainly the power to invade for her "pleasure" can stand on no different footing from the one to invade for the "happiness" of the widow in the *Merchants Bank* case. Here, as in that case (320 U. S. at 262), "The salient fact is that the purposes for which the widow [here the mother] could, and might wish to have the funds spent do not lend

[2] There appears to be nothing in the decisions of the courts of Tennessee, where the decedent resided at the time of his death, which would in any way curtail the discretionary power of invasion granted by the decedent's will. The Tennessee courts follow the general rule that a trustee's discretionary power will not be interfered with so long as he acts in good faith. "To do so would be to substitute the discretion of the court for that of the trustee". *Smith v. Fleisch*, 4 Tenn. App. 139, 146. See also *Guarantee and Trust Co.* v. *Jones*, 103 Tenn. 245, 252-253; *Miller* v. *Miller*, 149 Tenn. 463, 477-478; *Dooley* v. *Penland*, 156 Tenn. 284, 291; *Third National Bank* v. *Scribner*, 175 Tenn. 14, 35; Perry on Trusts (7th ed., 1929), Sec. 511. In *Matthews* v. *Capshaw*, 109 Tenn. 480, where the testator devised property to his wife for life with authority to sell it for the benefit of the family "in case of necessity", the court held that the wife was the sole judge of the "necessity" and that a sale by her was valid even though no actual necessity was shown. It would seem to follow *a fortiori* that a discretionary power to use corpus for the "pleasure" of the life tenant or in accordance with her "desire" would not be judicially circumscribed.

themselves to reliable prediction." That the mother died without any of the corpus having been diverted to her is of course of no consequence. To qualify for deduction from the gross estate the amount of the charitable bequest must be ascertainable as of the date of the decedent's death. *Humes* v. *United States, supra; Ithaca Trust Co.* v. *United States, supra; United States* v. *Provident Trust Co.*, 291 U. S. 272; *Taft* v. *Commissioner*, 304 U. S. 351. For all practical purposes, the retained power of invasion was equivalent to a power of revocation, and the likelihood of the exercise of the power of invasion was of no more consequence than the likelihood of the exercise of a power of revocation. The statutory allowance of a deduction for charitable bequests in Section 812 (d) of the Internal Revenue Code, *supra*, obviously was not designed to embrace the bequest of a fund which might be applied indifferently to charitable and non-charitable purposes. If any doubt on this score otherwise existed, it is dispelled by the long-standing implementing Treasury Regulations which were sustained in the *Merchants Bank* case.[3]

[3] Confirmation of the Congressional intent is contained in the amendment of Code Section 812 (d) by Section 408 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, which permits an irrevocable disclaimer of a power to invade a charitable bequest for a private purpose if the disclaimer is made prior to the date prescribed for filing the estate tax return. See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 166-167 (1942-2 Cum. Bull. 372, 494). An untimely attempt at disclaimer was made in this case. (R. 13, 20-21.)

The District Court, relying upon the authority of the *Merchants Bank* decision, properly dismissed the complaint upon motion of the Collector. (R. 25.) The Court below, while professing to be bound by that decision, in effect refused to accept it as controlling. Proceeding on the hypothesis that the charitable remainder had an ascertainable value if the allegations in the complaint relating to the mother's economical living habits and independent resources were proved (R. 34-35), it reversed and remanded the case for a determination of whether the possibility of invasion was "so remote as to be negligible" (R. 36). The error of the court below lies in its failure to discern the essential difference between a restricted power of invasion the exercise of which is susceptible of reliable prediction by objective standards, and one the exercise of which is utterly unpredictable because dependent on subjective considerations. The extrinsic facts alleged in the complaint might be material were we dealing with a limited invasionary power like that involved in the *Ithaca Trust Co.* case. But a plenary power to invade for the "pleasure" of a life beneficiary, like one to invade for her "happiness", introduces "elements of speculation too large to be overcome" irrespective of the beneficiary's living habits and separate resources. *Merchants Bank v. Commissioner, supra*, p. 263. The very *existence* of such a power renders the charitable remainder unmeasurable, and hence

non-deductible for estate tax purposes. Indeed, it is anomalous to characterize the possibility of the exercise of the power as "remote" (or imminent), for the simple reason that the extent to which the power may be exercised is a matter of sheer guesswork. It is precisely because the likelihood of the exercise of such a power is not susceptible of reliable prediction that the value of the charitable remainder is not susceptible of reliable measurement. See *Gammons* v. *Hassett*, 121 F. 2d 229 (C.C.A. 1st), certiorari denied, 314 U. S. 673; Paul, Federal Estate and Gift Taxation, 1946 Supplement, p. 437. In remanding the case for a determination of whether the possibility of invasion was "remote", the court below ordered the trial court to consider factors which could have no more relevancy here than in the *Merchants Bank* case. Even if the extrinsic facts alleged in the complaint were proved, taxpayer "could not" sustain the burden of proof because "the extent to which the principal might be used was not restricted by a fixed standard based on the [mother's] way of life". *Merchants Bank* v. *Commissioner, supra*, p. 261.

The question in this case having been authoritatively resolved by this Court in the *Merchants Bank* case, it is important that the lower courts uniformly abide by the result. The court below has disregarded the plain tenor of this Court's holding in the *Merchants Bank* case, as well as the

decisions of the Courts of Appeals which have followed it.[4] *Industrial Trust Co.* v. *Commissioner*, 151 F. 2d 592 (C.C.A. 1st), certiorari denied, 327 U. S. 788; *DeCastro's Estate* v. *Commissioner*, 155 F. 2d 254 (C.C.A. 2d), certiorari denied, 329 U. S. 727; *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175 (C.C.A. 1st); *National Bank of Commerce of San Antonio* v. *Scofield*, 169 F. 2d 145 (C.C.A. 5th), petition for certiorari filed October 18, 1948. To permit the decision below to stand will compel the District Court whose decision was here reversed to subscribe to the views of the court below, though contrary to those of this Court, and might well impel other lower courts to do so. Unless it is reversed estates within the jurisdiction of the court below, and of other courts which choose to follow its example, will enjoy preferential tax treatment.

[4] Two of the three cases upon which the court below relied (*Commissioner* v. *Upjohn's Estate*, 124 F. 2d 73 (C.C.A. 6th); *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788 (C.C.A. 10th)), antedated this Court's decision in the *Merchants Bank* case. The other (*Commissioner* v. *Robertson's Estate*, 141 F. 2d 855 (C.C.A. 4th)) involved a power to invade narrower than the one in the *Merchants Bank* case but does appear inconsistent with that case.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ARNOLD RAUM,
ELLIS N. SLACK,
LEE A. JACKSON,
HARRY BAUM,
Special Assistants to the Attorney General.

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